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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. _____

RALPH GROUNDS, HENRY HITCH, ET AL.
(LANDOWNERS)
Petitioners,

vs.

NORTHERN NATURAL GAS COMPANY, ET AL.
(HELEX GROUP)
and
SOCONY MOBIL OIL CO., INC.
(MOBIL OIL CORPORATION substituted),
ET AL. (LESSEE-PRODUCERS)
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Come now Ralph Grounds, Henry Hitch, et al. on behalf of themselves and other landowners similarly situated and petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming the judgment of the United States District Court for the District of Kansas.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix 144) is reported at 441 F.2d 704. The opinion of the District Court (Appendix 1) is reported at 292 F.Supp. 619.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1971. (App. 185) Petitions of Northern Natural Gas Company, et al. and Panhandle Eastern Pipe Line Company and National Helium Company (Helex Group) were denied on May 20, 1971. (App. 186) Jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. In a diversity case in which applicable state law requires that intent be determined as a question of fact and the facts found are that gas did not connote helium to the average lessor, that no landowner specifically contemplated helium in granting rights to produce "gas" and that landowners had an uninformed popular notion that gas was useful only for fuel, may landowners' license to produce oil and gas be expanded to include helium by imposition of a legal rule of "general intent," defined as an intent to license production of everything produced with oil and gas?

2. May a Court of Appeals prior to issuance of its mandate refuse to consider a controlling decision of a state supreme court rendered subsequent to the expiration of the time provided by the rules for filing a petition for rehearing?

3. Where applicable state law requires contracts to be interpreted in accordance with the law in effect at time of execution, may a rule of "general intent," which first received judicial recognition in a federal court long after all the leases were executed, be applied in the interpretation of the leases?

STATUTES INVOLVED

Oklahoma Statutes Annotated

Title 15, § 152:

"A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful."

Title 15, § 160:

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

Title 15, § 164:

"However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

STATEMENT OF THE CASE

References to Record

Landowner exhibits are referred to as LOX, lessee-producer exhibits as LPX and helex group exhibits as HX. Landowner witnesses are referred to as LOW, lessee-producer witnesses as LPW and helex group witnesses as HW. The opinion of the district court is referred to as DC and the opinion of the court of appeals as CA.

Factual Summary

Helium is produced from wells on landowners' lands in connection with oil and gas leasehold operations by lessee-producers. The lessee-producers deliver the helium to interstate pipeline systems. Under contracts with the United States, the pipeline systems make a physical (not chemical) separation of the helium from the natural gas and deliver it to a government pipeline, through which it is transported to an underground reservoir for storage, its identity still unchanged.[1]

Subject of Litigation

These consolidated cases involve the question of who is entitled to compensation for the helium delivered to the United States.

Parties

There are three competing groups.

The landowners consist of those persons owning lands within the area of the Hugoton Gas Field of Kansas, Oklahoma and Texas and the Panhandle Field of Texas, from whose lands helium has been and is being produced and delivered to the United States. The named landowners number more than 1,000.[2] They represent a class estimated at 30,000.[3]

The lessee-producers group consists of those individuals

1 C.A. App. 145; D.C. App. 2-3; LPX 223, p. 3, Bureau of Mines Bulletin 585 (1960)
2 D.C. App. 27
3 D.C. App. 22

and companies who produce fuel gas from landowners' lands and deliver it to Northern Natural Gas Company, Cities Service Gas Company or Panhandle Eastern Pipe Line Company. There are twelve named lessee-producers.[4] They represent a class estimated at 540.[5]

The helex group consists of the pipeline companies, their subsidiary or affiliated helium extraction companies, who separate the helium from natural gas, and the United States, to whom they deliver it.[6]

The trial court decided in favor of the helex group. The Court of Appeals decided in favor of lessee-producers.[7]

Nature of the Actions

Six of the cases are suits in the nature of interpleader filed by owners of the separation plants against landowners and lessee-producers under authority of 28 U.S.C. § 1335.[8]

Two of the suits are actions by landowners against the United States under authority of the Tucker Act, 28 U.S.C. § 1346(a)(2), and the Tort Claims Act, 28 U.S.C. § 1346(b). In these suits the United States filed third party complaints against the helex companies, including Phillips Petroleum Company, for partial indemnity against the claims of landowners.[9]

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4 D.C. App. 4-20
5 D.C. App. 25
6 C.A. App. 144-145
7 C.A. App. 145-146
8 C.A. App. 146
9 C.A. App. 146; D.C. App. 18-20

Essential Facts

The claims of both lessee-producers and the helex group are founded upon oil and gas leases executed by landowners.

Dates of execution of the leases were:

	Kansas	Oklahoma	Texas
Prior to 1940	14.6%	24.9%	36.1%
Between 1940 and 1945	60.9%	43.1%	30.7%
Between 1945 and 1950	16.0%	13.7%	16.4%
Between 1950 and 1955	7.1%	15.3%	15.2%
1955 to 1965	1.4%	3.0%	1.6%
	100.0%[10]	100.0%[11]	100.0%[12]

The most common lease form provides:

"1. That lessor, for and in consideration of the sum of One and No/100 - - Dollars ($1.00), in hand paid, and of the covenants and agreements hereinafter contained to be performed by the lessee, has this day granted and leased and hereby grants, leases and lets unto the lessee for the purpose of mining and operating for and producing oil and gas, casinghead gas and casinghead gasoline, laying pipe lines, building tanks, storing oil, building powers, stations, telephone lines and other structures thereon to produce, save, take care of and manufacture all of such substances, and for housing and boarding employees, the following described tract of land * * *.

"2. This lease shall remain in force for a term ending October 23, 1951, and as long thereafter as oil, gas, casinghead gas, casinghead gasoline, or any of them is produced.
* * *

"4. Lessee shall pay lessor monthly as royalty: (a) on gas marketed from each well, one-eighth (1/8) of the proceeds if sold at the well, or, if marketed by lessee off the leased

10 LOX 794, Sch. IV, Lease Form Summary, R. Vol. 168
11 LOX 794, Sch. V, Lease Form Summary, R. Vol. 168
12 LOX 794, Sch. VI, Lease Form Summary, R. Vol. 168

premises, then, one-eighth (1/8) of the market value thereof at the well; (b) on gas used by lessee for the extraction of casinghead gasoline, one-eighth (1/8) of the value of the natural gasoline content as determined by the Natural Gasoline Association of America revised contract, adopted April 4, 1939; * * *. Lessor shall have the privilege at his own risk and expense of using gas from any gas well on said land for stoves and inside lights in the principal dwelling located on the leased premises by making his own connections thereto.

* * *

"8. The lessee shall have the right to use free of cost, gas, oil and water found on said land for its operations thereon, except water from the wells of the lessor." (Pan American Form 1, R. Vol. 179)

More than ninety-nine per cent of the granting clauses contain the words "oil" and "gas," most frequently expressed as "oil and gas" as in the form above quoted.[13]

Helium is the product of the disintegration of radioactive substances. Natural gas is the product of the decomposition of organic matter under conditions of temperature and pressure from overlying strata.[14] The commingling of helium and natural gas, when it occurs, is coincidental, since they come from different sources.[15]

The characteristic of oil and gas (petroleum) which gives it value is its ability to combine with oxygen to produce heat and the ability of its hydrocarbon components

13 D.C. App. 83
14 D.C. App. 54
15 D.C. App. 54; LOW Berg R. 604; LOW Means, R. 672-675; HW Wheeler, R. 1451, 2053-2054; LOX 323, p. 5, Interior Dept. Press Release, R. Vol. 1o8

to combine chemically with a variety of compounds to produce a variety of products.[16]

The characteristics of helium which give it value are its light weight and its inability to combine with any other element, particularly oxygen, thus being noncombustible.[17]

As produced at the wellhead, natural gas from the Hugoton and Panhandle fields carries with it varying quantities of foreign substances, including nitrogen, sulphur compounds, hydrogen sulphide, water vapor, helium and in some instances carbon dioxide.[18] The water vapor is always removed.[19] If present in significant quantities, the sulphur compounds, hydrogen sulphide and carbon dioxide must be removed also.[20] Because of the impracticality of wellhead removal, nitrogen and helium are left in the gas stream and are vented at the burner tip.[21]

The presence of and quantity of these foreign substances can only be determined by a chemical analysis.[22]

Hofsess, vice-president of Cities Service Gas Company, testified, "* * * the customer that is using gas ordinarily don't know what is in that gas. He just knows it burns * * *. There isn't a householder in the whole system, including you, if you hadn't been handling the cases, that knew whether there was any helium or nitrogen in your

16 LOW Means, R. 501-520, 678, 696; HW Legatski, R. 5770, 5775-5796
17 D.C. App. 2; Helex film, R. 586-595
18 LPW Knappen, R. 4230-4231
19 LPW Knappen, R. 4230-4231
20 LPW Knappen, R. 4230-4231, 4237; HW Cullender, R. 5925
21 D.C. App. 67; LPW Knappen, R. 4235-4236; LOX 260, Northern Memo, R. 787-790
22 HW Hofsess, R. 5139; HW John Hanley, R. 5400

gas unless it was a technician or a person accustomed to handling gas matters.[23]

The helium content of the commingled gas streams from which helium is being separated averages about four-tenths of one per cent of total volume.[24] Prior to enactment of the Helium Act Amendments of 1960 helium had never been separated from gas streams having a helium content of less than nine-tenths of one per cent.[25] The commingled helium in the gas streams proceeding through the pipelines involved in this case was a worthless diluent without commercial value.[26]

In 1961 the United States contracted with Cities Service Helex, Inc., National Helium Company, Northern Helex Company and Phillips Petroleum Company for the delivery of a helium-gas mixture into a government pipeline over a period of twenty-two years for a consideration in excess of one billion dollars.[27]

The trial court found as a fact that gas had no connotation of helium to the average landowner, that no landowner specifically contemplated helium in granting rights to produce gas[28] and that landowners had an uninformed popular notion that gas was useful only for fuel.[29]

These findings were not attacked on appeal and were

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23 HW Hofsess, R. 5139
24 LOX 70, App. 2, Report Sub-Committee I, Nov. 1, 1957, R. Vol. 168
25 LOX 36, pp. 1-3, 9, Bureau of Mines Memo re Dexter, 1949, R. Vol. 168; LOX 253, Northern Memo, 1957, R. Vol. 168
26 D.C. App. 125-126
27 D.C. App. 75-76
28 D.C. App. 91
29 D.C. App. 94

accepted by the Court of Appeals.[30] That court said that if specific intent was the test the oil and gas leases did not extend to helium.[31] The court held, however, that the test was general intent to be determined by considering the purposes of the grant in terms of enjoyment of the rights created, citing New Values Under Old Oil and Gas Leases: Helium Who Owns It? 62 Mich. L. Rev. 1158, 1169.[32]

The terms "general intent" and "specific intent" had been in use for a long time in the field of criminal law.

"The general criminal intent in crimes is presumed from the criminal act itself. A specific intent in crimes is not presumed but is a matter of fact for the jury and must be established by the prosecution in the same manner as any other essential element." *Vandiver v. State,* 97 Okl. 217, 261 P.2d 617, syllabus (by the court) ¶'s 5 and 6.

The concept of "general intent" in the construction of contracts first found expression in 1949 in an article by Eugene O. Kuntz, Assistant Professor of Law at the University of Wyoming, entitled *The Law Relating To Oil and Gas In Wyoming,* Wyo.L.J. 3:107, App. 209. Oil and gas had only recently been discovered in Wyoming and the Supreme Court of Wyoming had not yet considered what was included in a grant or reservation of minerals. The author reviewed the decisions from other jurisdictions and explained that in many jurisdictions the decisions are

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30 C.A. App. 161
31 C.A. App. 162
32 C.A. App. 162-163

based upon determination of the intent of the parties as of the time and place of execution of the instrument. The author concluded this rule of interpretation was unsatisfactory because of uncertainty, stating, "A rule which requires consideration of the contemporaneous factual or legal setting would create the impossible situation of requiring the title examiner to inquire into the local folk-lore of the area or of requiring the examiner to retain a catalogued knowledge of the law as to dates of development." (App. 222)

Among the decisions criticized are:

Kansas: *Roth v. Huser,* 147 Kan. 433, 76 P.2d 871

Oklahoma: *Barker v. Campbell-Ratcliffe Land Co.,* 64 Okl. 249, 167 P. 468

Texas: *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.,* 106 Tex. 94, 157 S.W. 737; *Carothers v. Mills,* Tex.Civ.App., 233 S.W. 155; *Psencik v. Wessels,* Tex.Civ.App., 205 S.W.2d 658 and *Allen v. Heinatz,* Tex.Civ. App., 212 S.W.2d 987

The author advocated a rule of "general intent" based upon the test of "manner of enjoyment" under which it is *assumed* as a matter of law that a grant or reservation of minerals conveys or reserves every mineral, known or unknown, which can be extracted without substantial interference with enjoyment of the estate in the surface. (App. 218-222)

The author thus uses general and specific intent in the same sense in which they are used in criminal law — i.e. general intent is presumed as a rule of law and specific intent is determined as a fact.

"But when courts speak of 'presumed intent,' they mean that a rule of law is announced which takes no account of the actor's real intent." *In re Kountze Bros.*, 2 Cir., 79 F.2d 98, 102.

The general intent based upon manner of enjoyment theory was copied almost verbatim from the Kuntz article and applied to the question of whether leases of oil and gas include helium in an article entitled "New Values Under Old Oil and Gas Leases: Helium Who Owns It?" Mich. L. Rev. 62:1158, App. 228 The article was written by C. Douglas Kranwinkle, a law student. Mich. L. Rev. 62:1157

The opinion of the Court of Appeals reads:

"* * * We believe that the search should be for general intent rather than for a supposed, but unexpressed, specific intent. General intent should be discovered not by defining and redefining the terms used but by considering the purposes of the grant in terms of enjoyment of the rights created." C.A. App. 162

The quoted sentences were taken almost verbatim from the Kranwinkle article and were taken by Kranwinkle almost verbatim from the Kuntz article. The next succeeding sentence in the Kranwinkle article reads:

"Applying this suggested general intent test to the problem of contained gaseous elements, it should probably be *assumed* that the parties intended to dispose of all elements that come from the well in a gaseous state by providing for 'gas'." (Emphasis supplied. App. 248)

The Court of Appeals correctly stated, "We believe that it is a fair interpretation of the cases just cited to say that

in the three states intent is a question of fact." (App. 160)

The court then proceeded to apply the rule of general intent, a rule of law founded upon an irrebutable legal presumption.

After the expiration of time for filing a petition for rehearing, the Supreme Court of Oklahoma handed down its opinion in *Panhandle Cooperative Royalty Co., et al v. Cunningham, Ex'x., et al,* 42 Okl. Bar J. 1239. (App. 193) In the opinion the court reviewed with approval its prior decisions holding that "oil and gas" as used in leases and contracts meant only oil and gas as used in common parlance and excluded drip gas and casinghead gas if not mentioned specifically. The court further held that the addition of the words "and other minerals" to the words "oil and gas" broadened the term "oil and gas" to include anything produced with or as a constituent or component of gas whether or not it was a hydrocarbon substance. Appellant landowners attempted to call the case to the attention of the Court of Appeals by motion for leave to file the annexed petition for rehearing. (App. 187) The court overruled the motion upon the ground it was not filed within the time allowed under the rules for filing a petition for rehearing. (App. 192)

REASONS FOR GRANTING THE WRIT

1. In determining intent as a matter of law the decision is in conflict with the decisions of the courts of Kansas, Oklahoma and Texas requiring that intent be determined as a question of fact, as exemplified by *Roth v. Huser,*

147 Kan. 433, 76 P.2d 871; *Mack Oil Co. v. Laurence,* Okl., 389 P.2d 955; *Panhandle Cooperative Royalty Co., et al. v. Cunningham, Ex'x., et al.,* Okl., 42 Okl. Bar J. 1239, App. 193; *Fleming Foundation v. Texaco, Inc.,* Tex.Civ. App., 337 S.W.2d 846; *Atwood v. Rodman,* Tex.Civ.App., 355 S.W.2d 206; *Sun Oil Co. v. Whittaker,* Tex.Civ.App., 412 S.W.2d 680.

2. In refusing to consider a decision by the highest court of the state rendered subsequent to the expiration of time for filing a petition for rehearing but prior to issuance of a mandate the decision is in conflict with *Sun Oil Co. v. Burford,* 5 Cir., 130 F.2d 10, rev. on other grounds 319 U.S. 315, 87 L.ed. 1424, 63 S.Ct. 1098 and *Yanow v. Weyerhaeuser Steamship Company,* 9 Cir., 274 F.2d 274 and is probably in conflict with *Cahill v. New York, New Haven & Hartford Railroad Co.,* 351 U.S. 183, 100 L.ed. 1075, 76 S.Ct. 758.

3. In failing to apply the law applicable to interpretation of contracts in force at the time the contracts were executed, the decision is in conflict with the law of Kansas, Oklahoma and Texas as exemplified by *Securities Acceptance Corp. v. Perkins,* 182 Kan. 169, 318 P.2d 1058, 1061; *East Central Oklahoma Electric Coop. v. Public Service Co.,* Okl. 469 P.2d 662, 664; *Bagby v. Martin,* 118 Okl. 244, 247 P. 404, *Penner v. State,* Okl., 302 P.2d 144, 148; *Curtis v. Bagby,* Okl., 366 P.2d 616, 621; *Inter-Ocean Cas. Co. v. Lenear,* Tex.Civ.App., 95 S.W.2d 1355; *Chesser v. Murphy,* Tex.Civ.App., 386 S.W.2d 164, 168.

ARGUMENT AND AUTHORITIES

I.

Determination Of Intent As Matter Of Law Conflicts With Law Of Kansas, Oklahoma And Texas

Kansas, Oklahoma and Texas have always followed the rule of interpretation of contracts that intent is to be determined as a question of fact determined as of the time and place of contracting.[33] In Oklahoma the rule is statutory: "A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful." 15 O.S.A. § 152.

Under the law of all three states, absence of specific intent as to a particular subject could not be supplied by any court and meant absence of contract on the subject. The Oklahoma rule was again statutory. "However broad may be the terms of a contract, it extends only to those things concerning which it appears the parties intended to contract." 15 O.S.A. § 164.

In *Anderson v. Rexroad,* 175 Kan. 676, 266 P.2d 320, 323, the court said:

> "The established rule is that the intention of the parties and the meaning of a contract are to be deduced from the instrument where its terms are plain and unambiguous; * * * that words cannot be read into a contract which import an intent wholly unexpressed when it was executed; and that the court may not make an agreement for the parties which they did not make for themselves."

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33 C.A., App. 160; *Roth v. Huser,* 147 Kan. 433, 76 P.2d 871; *Mack Oil Co. v. Laurence,* Okl., 389 P.2d 955; *Fleming Foundation v. Texaco, Inc.,* Tex.Civ.App., 337 S.W.2d 846; *Atwood v. Rodman,* Tex.Civ.App., 355 S.W.2d 206; *Sun Oil Co. v. Whittaker,* Tex.Civ.App., 412 S.W.2d 680.

The situation is analogous to that where objects sold contain other objects unknown to the parties. Where this occurs, "Unknown contents of the subject matter of a sale that are not essential to its existence or usefulness, but which are merely deposited therein, and which are not within the contemplation of or intention of the contracting parties, do not pass by the sale." *West Coast Airlines, Inc. v. Miner's Aircraft & E. Service,* 66 Wash.2d 513, 403 P.2d 833, 836.

"A sale must rest on mutual consent of the parties as to all of its terms, including the identity of the thing sold. Where there is no consensus ad idem there can be no sale." *American National Bank v. West,* 31 Tenn.App. 85, 212 S.W.2d 683, 685.

In *Phillips v. Henderson Co.,* 101 Okl. 277, 225 P. 668, an oil and gas lease sold to a gasoline company "all of the casinghead gas produced from oil wells located on the hereinafter described real estate." The purchaser agreed to meter the gas and to pay four cents per mcf. The sellers installed scrubbers and a drip between the well head and buyer's meter. The scrubber and drip were designed to drain out of the line water and other waste. In the Winter the drip collected condensate or drip gasoline which had commercial value. The trial court held that since the drip gasoline came out of the casinghead gas, it belonged to buyer.

The Supreme Court reversed stating,

"* * * If the parties made no contract regarding the waste product, then by construing the contract in accordance with section 5051, C.S. 1921 [now 15 O.S.A. § 164, *supra* p. 3] the contract would not extend to this subject matter." (225 P. at 671)

In *Mid-Continent Petroleum Corp. v. Blackwell Oil & Gas Co.,* 159 Okl. 35, 15 P.2d 1028, the holder of an oil and gas lease entered into a contract with a gas company under which the lease holder assigned and conveyed to the gas company all of its gas rights. The gas company installed a drip between the well head and the meter. The drip collected liquid gasoline at the rate of several hundred gallons per day. The trial court held that the drip gasoline belonged to the gas company. The Supreme Court reversed.

In the opinion the court said:

"* * * There is no provision in the contract by which it can be said that the gasoline was assigned or conveyed by the oil company to the gas company. Since it was not assigned and conveyed by the oil company to the gas company, it remained the property of the oil company, for, as held in George et al. v. Curtain, 108 Okl. 281, 236 P. 876, 877, all rights claimed under a contract, which are not conferred in direct terms, or by fair implication, are to be considered withheld. In that case this court said: 'It is the duty of the court to construe the contracts as written, and not to enlarge upon the contract and make new contracts for the parties regarding matters upon which their minds have not met.' " (15 P.2d at 1034)

In a series of cases known as the casinghead cases, the Supreme Court of Oklahoma held that casinghead gas, by which is meant gas from a well also producing oil, being neither oil nor gas as those terms are used in common parlance, is not covered by an oil and gas lease which does not specifically mention such gas. *Hammett Oil Co. v. Gypsy Oil Co.,* 95 Okl. 235, 218 P. 501; *George v. Curtain,* 108 Okl. 281, 236 P. 876; *Mullendore v. Minnehoma Oil Co.,* 144 Okl. 251, 246 P. 837; *Broswood Oil Co. v. Sand Springs Home,* 178 Okl. 550, 62 P.2d 1004.

The Court of Appeals ignored *Phillips v. Henderson, supra,* and *Mid-Continent Petroleum Corp. v. Blackwell Oil & Gas Co., supra,* and distinguished the casinghead *royalty* cases upon the ground that none of the gas involved in the cases at bar was casinghead gas. App. 158 Neither *Phillips v. Henderson* nor *Mid-Continent Petroleum Corp. v. Blackwell* involved royalty and *Mid-Continent* did not involve casinghead gas. The court was factually incorrect in stating that none of the gas involved in the cases at bar was casinghead gas. Actually about 6.23 per cent of the gas involved is casinghead gas. HX 42, Part 3, R. Vol. 183, Annual Volumes of Gas Produced During Year 1965 From Fields Where The Helium Constituent Was Extracted From Some Of The Gas.

The point of the casinghead cases and of *Phillips v. Henderson* and *Mid-Continent Petroleum Corp. v. Blackwell,* all *supra,* was that not only leases but all contracts relating to oil and gas mean oil and gas as understood in common parlance and exclude anything not regarded as oil or gas as those words are used in common parlance. Applying that rule to the facts found that oil and gas had no connotation of helium and that no landowner had any specific intent to license helium production,[34] helium was clearly excluded from the oil and gas described in the leases.

On May 11, 1971, some two months after the decision in the case at bar and after the time for filing a petition for rehearing had elapsed, the Supreme Court of Oklahoma handed down its opinion in *Panhandle Cooperative Royalty*

34 D.C., App. 91; C.A., App. 161

Co., et al. v. Cunningham, Ex'x., et al., 42 Okl. Bar J. 1239, App. 193. That case was a suit by mineral owners to quiet title to all minerals "other than oil and gas and other hydrocarbon type minerals." Defendants claimed under a mineral deed conveying "all oil, gas and other minerals." The trial court entered judgment for plaintiffs as prayed. The Supreme Court modified the judgment by excepting also all minerals produced with oil and gas.

The court reviewed the casinghead cases with approval, held that the addition of the words "and other minerals" "has a special purpose in extending the connotation of 'oil and gas' only." (App. 199-201) The court held that the addition of the words "other minerals" to "oil and gas" had the effect of extending the grant to all minerals whether hydrocarbon or nonhydrocarbon which emerge as a constituent or component of gas as it emerges from the wellhead. (App. 201)

Since the decision is based wholly upon the addition of the words "and other minerals," no component not regarded as oil and gas in common parlance would be covered in the absence of the words "and other minerals."

On June 8, 1971, appellant landowners attempted to call the decision of the Supreme Court of Oklahoma to the attention of the court by motion for permission to file an annexed petition for rehearing out of time. (App. 187) The court denied the motion on the ground it was out of time (App. 192-193) and thus has not considered the subsequent decision by the Supreme Court of Oklahoma.

The effect of the subsequent decision of the Oklahoma Supreme Court upon the judgment of the Court of Appeals in that court is discussed under the next heading of this argument. Whatever may be decided upon that point, the Oklahoma decision must be accepted by this court as stating the law of Oklahoma. *Thorpe v. Housing Authority of Durham,* 393 U.S. 268, 281-283, 21 L.ed.2d 474, 89 S.Ct. 518.

The opinion of the Court of Appeals states that the term oil and gas includes helium produced with the gas. The opinion of the Supreme Court of Oklahoma states that the term oil and gas includes substances produced with oil and gas only if the words "and all other minerals" or the equivalent be contained in the grant. The two decisions are not compatible and the decision of the Court of Appeals must yield to the decision of the Supreme Court of Oklahoma, at least as to Oklahoma leases.

Less than four per cent of the acreage covered by the Kansas and Oklahoma leases contain the words "other minerals." LOX 839, R. Vol. 168. On the other hand, 55.775 per cent of the acreage covered by the Texas leases contain such words. LOX 840, R. Vol. 168. Of the total acreage involved in all three states only 18.118 per cent is covered by leases containing the words "other minerals" or their equivalent. LOX 838, R. Vol. 168.

The necessity for resolution of conflicts and tension between state and federal courts has been the subject of comment by the Chief Justice of the United States. Burger, The

State of the Judiciary, A.B.A. Journal 56:929, 933; Burger, Deferred Maintenance, A.B.A. Journal 57:425, 426.

The most common source of these conflicts and tensions is the frequent failure of federal appellate judges to give more than lip service to the mandate of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 82 L.ed. 1188, 58 S.Ct. 817.

District judges adhere to the rule of that famous case, because appeal is a matter of right. Knowing that this court can only review a limited number of cases, federal appellate courts frequently ignore *Erie Railroad* in fact, although not in words. The present decision is an aggravated example. Until the Courts of Appeal become convinced that the *Erie* rule is as mandatory upon them as upon the district courts, resolution of conflicts between state and federal courts is impossible.

In *Hanna v. Plumer,* 380 U.S. 460, 467, 14 L.ed.2d 8, 14-15, 85 S.Ct. 1136, the court said:

> "The Erie rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.
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> * * *
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> "The decision was also in part a reaction to the practice of 'forum-shopping' which had grown up in response to the rule of Swift v. Tyson. 304 US, at 73-74, 82 L ed at 1191-1192, 114 ALR 1487. * * *"

These cases are "forum-shopping" cases. Suits were filed by the landowners in the state courts of Kansas and Oklahoma. The helex companies then filed these interpleader suits and procured an injunction against prosecution of the

pending state court suits.[35] The failure of the Court of Appeals to apply state law rewards forum-shopping and encourages its practice in the future.

The predictable attitude of the Kansas Court, which undoubtedly prompted the forum-shopping here, is expressed in *Gilmore v. Superior Oil Co.,* 192 Kan. 388, 388 P.2d 602, 605. The court there said:

> "Construction of oil and gas leases containing ambiguities shall be in favor of the lessor and against the lessee. (2 Summers on Oil and Gas, perm. ed., § 372, p. 485; Stady v. Texas Company, 150 Kan. 420, Syl. ¶ 2, 94 P.2d 322.) It is puzzling to understand why the above textwriter had such difficulty with this rule for the reason that the lessee of an oil and gas lease usually provides the lease form or dictates the terms thereof, and if such lessee is desirous of a more complete coverage of the marketing of oil, gas, liquid hydrocarbons, *or even helium gas, which has recently been found to exist in the minerals underlying the vast Hugoton field,* the lessee has the opportunity to protect itself by the manner in which it draws the lease. * * *" (Emphasis supplied.)

Concededly dicta, the case leaves little doubt as to what the result would have been if further prosecution of the cases in the Kansas state courts had not been enjoined.[36]

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35 KC-1969, R. Vol. 111 Doc. 7, R. Vol. 113 Doc. 81; KC-1945, R. Vol. 1 Doc. 9, R. Vol. 2 Doc. 47; KC-1946, R. Vol. 2 Doc. 36; KC-1947, R. Vol. 1, Doc. 38; KC-1948, R. Vol. 3 Doc. 57; KC-1980, R. Vol. 1 Doc. 19, R. Vol. 2 Doc. 37

36 Even before *Erie Railroad* this court said, "A wise comity has decreed that deference shall at times be owing, though there may be lacking, in the circumstances, a strict duty of obedience. * * * But the result will not be changed though the definition of perpetuities be something less than a decision. At least it is a considered dictum, and not comment merely *obiter.* It has capacity, thought it be less than a decision, to tilt the balanced mind toward submission and agreement." *Hawks v. Hamill,* 288 U.S. 52, 58-59, 77 L.ed. 610, 617, 53 S.Ct. 240

II.

Court's Refusal To Consider Controlling Decision Of Oklahoma Supreme Court Rendered Subsequent To Expiration Of Time For Filing Petition For Rehearing But Prior To Issuance Of Mandate Conflicts With Decisions Of Fifth And Ninth Circuits And Probably Conflicts With Decisions Of This Court

At the time appellant landowners sought to call the decision of the Oklahoma Supreme Court in *Panhandle Cooperative Royalty Co. v. Cunningham* to the attention of the Court of Appeals that court still retained jurisdiction over the consolidated cases. Motions had been filed seeking a stay of the mandate and the court had invited comment by all parties. (App. 186)

On many occasions this court on certiorari has remanded cases to Courts of Appeal to consider subsequent decisions of state courts. An illustration is *Collins v. Commissioner of Internal Revenue,* 393 U.S. 215, 21 L.ed.2d 355, 89 S.Ct. 388.

Since the Court of Appeals still had jurisdiction, appellant landowners were of the opinion that that court should and would avail itself of the opportunity to conform its decision to that of the Supreme Court of Oklahoma without the necessity for certiorari, vacation and remand. The Court of Appeals disagreed. (App. 192)

The denial of the motion for permission to file petition for rehearing out of time was said to be based upon appellate rule 40 limiting the time for filing a petition for rehearing.

Appellate rule 2 provides:

"In the interest of expediting decision or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction."

This rule clearly authorizes a departure from the rules for good cause shown.

Prior to promulgation of the Rules of Appellate Procedure, Courts of Appeal held that they had inherent power to alter or amend their judgments during the term in which rendered.

In *Sun Oil Co. v. Burford*, 5 Cir., 131 F.2d 11, rev. on other grounds 319 U.S. 315, 87 L.ed. 1424, 63 S.Ct. 1098, the appellate court judgment was rendered December 29, 1941. On March 22, 1942, a conflicting decision of the Supreme Court of Texas was handed down. On May 19, 1942, the Court of Appeals handed down an opinion in another case following the state court decision and conflicting with the earlier decision of the Court of Appeals. On July 11, 1942, the Court of Appeals on second petition for rehearing recalled its mandate and vacated its judgment of December 29, 1941.

In *Union Producing Co. v. White*, 5 Cir., 151 F.2d 54, the court sustained a second petition for rehearing because of a change in the facts since its decision.

In 1948 Congress enacted 28 U.S.C. § 452 providing that expiration of a term of court should not affect the power of a court to do any act.

In *Boudoin v. Weyerhaeuser Steamship Company*, [illegible] the Court of Appeals for the Fifth Circuit asserted its power to amend its judgments pursuant to Rule 60 F.R.C.P. which had been adopted as a rule of that circuit without regard to expiration of the term at which rendered.

In *Boudoin v. New Haven & Hartford Railroad* [illegible] 350 U.S. 891, 100 L.ed. 1075, 76 S.Ct. 758, the court, after a petition for rehearing presenting the same question had been overruled, sustained a motion to recall and modify its decision for error of law.

The court there said:

"We deem our original order erroneous and recall it in the interest of fairness. Similar relief was requested by respondent in a petition for rehearing denied in 350 US 943, 100 L.ed. 821, 76 S.Ct. 306. Rule 58(4) bars consecutive and successive petitions for rehearing. The Boudoin Case, however, considered a motion to recall a judgment that asked the same identical relief. Yet, if it had been considered a petition for rehearing, it was filed out of time. The grant of the motion in the Boudoin Case shows that Rule [illegible] does not prohibit motions to correct this kind of error." 100 L.ed. at 1077.

We think the decision of this court and of the fifth and ninth circuits state the preferable common sense rule. Why should a court of appeals consider a subsequent state court decision called to its attention prior to the filing or expiration of time for filing a petition for certiorari? Such a procedure is obviously more expeditious and less expensive if the court of appeals finds the decision controlling.

it can correct its judgment without the useless intervention of this court.

In any event, an important subject of appellate procedure is involved which should be settled by this court.

III.

Decision Conflicts With Decisions Of Kansas, Oklahoma And Texas Requiring Contracts To Be Interpreted In Accordance With Rules Of Interpretation In Effect At Time Of Execution

In Kansas, Oklahoma and Texas, existing law, including the law relating to construction of contracts, is a part of every contract to the same extent as though written therein. *Securities Acceptance Corp. v. Perkins,* 182 Kan. 169, 318 P.2d 1058, 1061; *East Central Oklahoma Electric Coop. v. Public Service Co.,* Okl., 469 P.2d 662, 664; *Inter-Ocean Cas. Co. v. Lenear,* Tex.Civ.App., 95 S.W.2d 1355. Such is the rule generally. *Farmers & Merchants Bank v. Federal Reserve Bank of Richmond,* 262 U.S. 649, 660, 67 L.ed. 1157, 43 S.Ct. 651; *Wood v. Lovett,* 313 U.S. 362, 370, 85 L.ed. 1404, 61 S.Ct. 983.

Even though the law may have been changed by judicial construction, contracts are to be interpreted according to the law in force at the time they were executed. *Bagby v. Martin* 118 Okl. 244, 247 P. 404, syl. by the court; *Penner v. State,* Okl., 302 P.2d 144, 148; *Curtis v. Bagby,* Okl., 366 P.2d 616, 621; *Chesser v. Murphy,* Tex.Civ.App., 368 S.W.2d 164, 168.

The concept of general intent in the interpretation of contracts, applied by the Court of Appeals, first received judicial recognition in *Navajo Tribe of Indians v. United States,* Ct.Cl., 364 F.2d 320 (1966). All of the leases involved were executed many years prior to 1966. (LOX 794, Schedules IV, V, VII, Lease Form Summary, R. Vol. 168) In fact the cases at bar had been on file for many years prior to 1966. (Compl., R. Vol. III, Doc. 1)

Even if it could be said that the Court of Appeals had some reason to believe that the courts of Kansas, Oklahoma and Texas would adopt prospectively the concept of general intent in the interpretation of contracts, it still could not be applied to the leases involved.

Landowners submit that they have been deprived of their property by ex post facto judicial legislation, imposed by a court not authorized to alter existing state law.

CONCLUSION

Petitioners pray that the writ be granted, the judgment vacated and the case remanded to the Court of Appeals for consideration in the light of *Panhandle Cooperative Royalty Co., et al. v. Cunningham, Ex'x., et al.,* 42 Okl. Bar J. 1239; *Securities Acceptance Corp. v. Perkins,* 182 Kan. 169, 318 P.2d 1058, 1061; *East Central Oklahoma Electric Coop. v. Public Service Co.,* Okl. 469 P.2d 662, 664; *Bagby v. Martin,* 118 Okl. 244, 247 P. 404; *Penner v. State,* Okl., 302 P.2d 144, 148; *Curtis v. Bagby,* Okl. 366 P.2d 616, 621; *Inter-Ocean Cas. Co. v. Lenear,* Tex.Civ.App., 95 S.W.2d 1355; *Chesser v. Murphy,* Tex.Civ.App., 386

S.W.2d 164, 168. In the alternative, petitioners pray that the writ be granted and the case placed upon the appellate calendar.

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